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In the
Supreme Court of the United States

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**ON EXCEPTIONS TO THE REPORT OF THE
SPECIAL MASTER**

**REPLY BRIEF OF THE STATE OF NEW JERSEY
IN OPPOSITION TO THE EXCEPTIONS OF
THE STATE OF NEW YORK**

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SUMMARY OF ARGUMENT ¹

New York's claim that the Compact granted it jurisdiction over the entire Ellis Island, regardless of the extent of the Island's expansive growth in the years following the Compact, is not supported by evidence or consistent with legal principles. Under the Compact, New York's jurisdiction is limited to the Island as it existed in 1834. New York additionally cannot establish that it acquired jurisdiction over the filled portions of the Island through prescription and acquiescence. New York has proven neither the exercise of governmental authority by New York nor the silent acceptance of such acts by New Jersey necessary to establish such a claim. Finally, the Court's prior opinions make clear that laches is not applicable to boundary disputes between States. Even if the doctrine were to be applied in this case, New York failed to prove that it was prejudiced by any alleged delay by New Jersey.

ARGUMENT

POINT I

UNDER ARTICLE II OF THE COMPACT, THE LANDFILLED PORTIONS OF ELLIS ISLAND CREATED AFTER THE COMPACT WAS ADOPTED ARE PART OF NEW JERSEY AND SUBJECT TO ITS SOVEREIGNTY AND JURISDICTION.

New York rests its entire claim under the Compact on its assertion that Article II grants New York jurisdiction over the whole of the Island as it exists today. However, as the Special Master correctly found, Article I of the Compact established a permanent interstate boundary at the middle of

¹ The State of New Jersey incorporates herein the Procedural History and Overview of the Special Master's Report and Recommendation set forth in its Brief in Support of Exceptions filed with this Court on July 31, 1997.

the dividing waters between New Jersey and New York, and thus placed Ellis Island and the subaqueous lands surrounding it within New Jersey waters. Article II provides that New York will "retain" its "present jurisdiction" over Ellis Island. The Article further provides that New York will "retain" exclusive jurisdiction over the other islands "lying" in the waters between the States and "now" under New York jurisdiction. Article II of the Compact was intended to preserve the *status quo ante* of 1834. *Central R.R. Co. v. Mayor of Jersey City*, 209 U.S. 473, 479 (1908). Significantly, Article II contains no reference to future improvements or filling. In sharp contrast, Articles III and V explicitly provide that New Jersey and New York shall have jurisdiction over improvements "made and to be made" on their respective shores.

Well-established principles governing the interpretation of interstate Compacts require that the Court interpret Article II in accordance with its plain meaning. *Oklahoma v. New Mexico*, 501 U.S. 221, 245, 247 (1991)(Rehnquist, C.J., concurring and dissenting); *Carchman v. Nash*, 473 U.S. 716, 724-27 (1985); *Texas v. New Mexico*, 462 U.S. 554, 564, 572 (1983). The use of present tense language throughout the Article, coupled with its lack of reference to any future landfilling or improvements, indisputably shows that New York's jurisdiction under the Article never was intended to encompass new land masses or islands created by artificial filling after 1834. Rather, the "Ellis's Island" referenced in the Article was the 2.74-acre "Ellis's Island" that existed in 1834.

When an interstate boundary is established by Compact and approved by Congress, that boundary becomes final and binding, and extinguishes any previous boundary claims. *Virginia v. Tennessee*, 148 U.S. 503, 525, 526 (1893); *Coffee v. Groover*, 123 U.S. 1, 30-31 (1887); *Poole v. Fleeger's Lessee*, 36 U.S. (11 Pet.) 185, 210 (1837). The

Court consistently has held that a boundary set by Compact incorporates and refers to the physical conditions that existed when the boundary was adopted, and cannot be based on physical changes that occurred afterwards. *See, e.g., Georgia v. South Carolina*, 497 U.S. 376, 396-98 (1990)(new islands that emerged after boundary was set and which were located within South Carolina's boundary were part of South Carolina, even though boundary agreement gave Georgia sovereignty over "all the islands" in the river); *Ohio v. Kentucky*, 444 U.S. 335 (1980)(interstate boundary was low water line of 1792, not current low water line); *Minnesota v. Wisconsin*, 252 U.S. 273, 279-80 (1920)(main channel, or boundary line, was the channel that existed in 1846, not the channel subsequently created by dredging); *Arkansas v. Tennessee*, 246 U.S. 158, 177 (1918). Accordingly, Article II refers to the Ellis Island of 1834, and under Articles I and II, the landfilled portions of Ellis Island created after 1834 are part of New Jersey and subject to its sovereign governmental power and jurisdiction.

The States' intention underlying the 1834 agreement is not simply reflected in the plain language of the Compact, it is also evidenced by New Jersey's 1829 Complaint in this Court in which New Jersey argued that New York's only claim to the islands arose from adverse possession and that New York's adverse possession had been limited to the fast lands. Thus, to the extent that the 1834 Compact reflects New Jersey's willingness to accede to New York's jurisdictional claim to Ellis Island, New Jersey's concession related solely to the fast land, the land that existed in 1834.

New York nevertheless argues that the States must have contemplated the expansion of Ellis Island after 1834 because, in New York's view, landfilling on both sides of the Hudson River was a commonplace, accepted practice when the Compact was made. New York argues that its "present jurisdiction" under Article II should therefore be interpreted to include the 24 acres of made land created by

the United States by filling submerged lands in New Jersey waters in the years after 1834. However, there is not a shred of evidence in the legislative history of the Compact which supports the notion that the Commissioners who negotiated the 1834 agreement contemplated that New York's jurisdiction over the Island could be enlarged without limitation in New Jersey territory.

Moreover, New York's factual claim that landfilling was widespread in New York Harbor in 1834 and therefore landfilling around the original Island must have been anticipated by the States was appropriately rejected by the Special Master. The record does not support that assertion. In fact, New York's own expert witness, Donald F. Squires, conceded that although there had been some filling of submerged lands on the New York side of the Harbor, as of 1834 there was very little filling on the New Jersey side of the Hudson River. T2851-22 to T2852-10; T2857-18 to T2858-12. Filling of lands along the Jersey shoreline was minor until the railroads reached the area after 1848. *See* D932 at p. 13. Furthermore, the record contains no conclusive evidence that by 1834 any filling had occurred around the original Island. T265-14 to T266-19; T292-9 to T293-13; T313-11 to -20; T336-10 to T338-1; T250-5 to -8, P478, p. 18.

The earliest maps in the record indicate that Ellis Island was about three acres at the beginning of the 19th Century. P382(d). The Island was some 2.74 acres in 1834 and essentially remained that size until large scale filling commenced in 1890. Compare P382(j) and P382(l). Rather than anticipating extensive filling around the original Island,

the Commissioners would more likely have assumed that the size of the Island would remain stable.²

In further support of its contention that Article II allows New York to exercise jurisdiction over the filled portion of the Island, New York disputes the Special Master's finding that Ellis Island was, in fact, at one time three land masses, entirely separated by water. Report at 94-97. New York asserts that Ellis Island is today and has always been one island. However, the evidence fully supports the Special Master's factual finding that the present Island is made up of land area that was at one time three separate and distinct islands. Report at 95.

The United States expanded the original Island after 1890 by filling some eight acres of submerged lands in New Jersey waters. The federal government then built a second island in 1899, and built a third island in 1905 to 1906. These three land areas have long been referred to as Islands Nos. 1, 2, and 3. See Historical Development Map, Report at 14a. Island No. 2 was initially connected to Island No. 1 by a ferry house and covered walkway built on pilings over water. The 1901 photograph of these connecting structures, which is included as Exhibit E in the Special Master's Report, plainly shows that those structures were built on pilings, that there was water under the structures and that the water could pass directly out from under the ferry basin

² New York also relies upon the 1686 Dongan Charter and the 1730 Montgomerie Charter in support of its contention that landfilling around Ellis Island would have been anticipated by the States when the Compact was made in 1834 but there is no evidence that the provisions of either document were relied upon for filling of lands on the Jersey side of the Harbor. Indeed, the evidence also shows that the Montgomerie Charter of 1730 pertaining to New York City did not give the City or anyone else the right to reclaim the submerged lands within the western part of the Hudson River or the submerged lands surrounding Ellis Island. D743; T1594-24 to T1595-8.

between the Islands No. 1 and 2 to the Bay of New York.³ In addition, the record unequivocally shows that Island No. 1 was not connected by fill to Island No. 2 until 1933, and that Islands 2 and 3 were not connected to each other by fill until the 1920's. See P382; P386. Research documents compiled for the federal government by New York's expert, Harlan D. Unrau, are replete with references to Islands Nos. 1, 2 and 3. See D74 and D952. The evidence thus conclusively establishes that the land area presently referred to as Ellis Island is not the same as the "Ellis's Island" referred to in the Compact.

New York further contends that it was granted jurisdiction over the waters of the harbor to promote, as Justice Holmes noted in *Central R.R.*, *supra*, "the interests of commerce and navigation." 209 U.S. at 479. New York insists that this purpose can only be accomplished by interpreting Article II to encompass the islands that existed in 1834, all expansions to those islands, and, apparently, all new islands that emerged after 1834. But this argument, too, lacks any support whatsoever in the legislative history. There is nothing to buttress the claim that New York deemed retention of jurisdiction over Ellis and the other islands essential to the exercise of its limited authority over navigation and commerce on the waters.

As it relates to Ellis Island, this assertion is refuted by the fact that decades before the Compact was agreed to New York sold the Island to the federal government and

³ New York endeavors to controvert what the eye can plainly see by relying on Dr. Squire's entirely speculative assertion that Island No. 1 and Island No. 2 were somehow connected by "timber cribbing" beneath the water. NY's Exceptions Brief at 20. The water purportedly "obscures the solid cribbing." Significantly, Dr. Squires could not point to any evidence in the record to support his theory. The Special Master rightly commented that a picture is worth a thousand words. Report at 96; T2233.

ceded virtually all governmental authority over the Island to the United States. New York certainly did not view ownership or control of the Island to be at all necessary to its jurisdiction over the waters of the Harbor, a fact further underscored by the purported transfer and cession of jurisdiction over the adjoining submerged lands in 1880. New York's own actions completely undermine its claim that control of the Island and surrounding fill were a necessary ingredient to its authority to promote "the interests of commerce and navigation." *Id.*

New York's argument in this regard is merely a variation of the assertion it advanced in 1870, when it claimed that its Article III power was the equivalent of sovereignty on the New Jersey side of the boundary line. That assertion was rejected by New York's highest court in *People v. Central R.R.*, 42 N.Y. 283, *appeal dismissed*, 79 U.S. (12 Wall.) 455 (1870). The New Jersey courts also rejected the contention. *See Central R.R. v. Mayor of Jersey City*, 56 A. 239 (N.J. Sup. Ct. 1903), *aff'd*, 61 A. 1118 (N.J. 1905). In 1908, this Court reached the same conclusion in *Central R.R.*, *supra*. The courts uniformly have agreed that New York's Article III jurisdiction cannot override the sovereign boundary in Article I. The same conclusion must obtain with regard to New York's jurisdiction over Ellis Island under Article II.

POINT II

THE BOUNDARY ESTABLISHED IN ARTICLE I IS A SOVEREIGN BOUNDARY, NOT A MERE ALLOCATION OF PRIVATE PROPERTY RIGHTS.

Before the Special Master, New York asserted that the boundary established in Article I was not a sovereign boundary within the waters between New York and New Jersey, but simply gave New Jersey property rights in the submerged lands. New York apparently has abandoned this

particular argument in its exceptions, and now primarily relies on Article II to support its contention that the landfilled portions of Ellis Island created after 1834 are within its territory. However, *amici* argue that under the Compact "jurisdiction" means "sovereignty," and that the Compact only gave New Jersey property rights in the waters surrounding Ellis Island, not governmental authority.⁴

The contention that New Jersey only has property rights in the submerged lands on its side of the boundary in the dividing waters was rejected by the Court in *Central R.R.*, *supra*. As Justice Holmes pointed out for the Court:

It appears to us plain on the face of the agreement that the dominant fact is the establishment of the boundary line. The boundary line is the line of sovereignty, and the establishment of it is not satisfied, but is contradicted, by the suggestion that the agreement simply gives the ownership of the land under water on the New Jersey side to that state as a private owner of land lying within the state of New York. On the contrary, the provision as to exclusive right of property in the compact between states is to be taken primarily to refer to ultimate sovereign rights, in pursuance of the settlement of the territorial limits, which was declared to be one purpose of the agreement, and is not to be confined to the assertion and recognition of a private claim [209 U.S. at 478].

⁴ The Special Master rejected this assertion and New York has not taken exception to that finding. For this reason, the Court should decline to entertain argument by *amici* on the issue.

As Justice Holmes noted in his opinion, the Court's interpretation of the agreement was based on the uniform interpretation of the agreement reflected in the decisions of the highest courts of New Jersey and New York. *Id.* at 479.

New York has accepted the decision of its highest court since it was rendered in 1870. Indeed, in 1880, when the boundary Commissioners from both States formally drew the boundary that had been agreed to in 1834, they did so based on the 1870 decision of the New York Court of Appeals. P329. In 1921, New York and New Jersey supplemented the Compact of 1834 by establishing the New York Port Authority, and agreed once again that they shared a common, sovereign boundary at the middle of the Hudson River and Bay of New York. P408, p. 39, p. 70; P407, p. 38; P409, p. 13; P407, Part II, p. 44. Like the Compact of 1834, this supplement was approved by Congress. 42 Stat. 174 (1921).

It is simply too late in the day for New York and its *amici* to relitigate the question of whether the boundary line is a line of sovereignty or merely a line dividing the property interests of the States in the land under the waters of New York Harbor. While New York may continue to believe that Justice Holmes was "wrong" in the *Central R.R.* decision, its long standing acceptance of that decision, and the prior ruling of its own Court of Appeals, effectively forecloses New York and its *amici* from relitigating the issue in this Court. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) ("With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, *The Nature of the Judicial Process* 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by

definition, indispensable.")(O'Connor, Kennedy and Souter, JJ.).⁵

POINT III

SPECULATIVE FEARS THAT DUAL JURISDICTION OVER ELLIS ISLAND WILL BE IMPRACTICABLE HAVE NO FACTUAL FOUNDATION AND DO NOT PROVIDE A BASIS FOR ALTERING THE INTERSTATE BOUNDARY ESTABLISHED BY THE STATES AND APPROVED BY CONGRESS IN 1834.

New York *amicus* Trust for Historic Preservation posits that dual jurisdiction over Ellis Island will create insurmountable practical difficulties and impede the preservation of Ellis Island as a historic landmark. Similarly, New York *amici* New York Landmarks Conservancy, Preservation League of New York State, and Historic Districts Council urge the Court to hold that under Article III, New York should be granted sole jurisdiction over historic preservation. This Court should not base its decision on the speculative, unsubstantiated and exaggerated fears of *amici*, and should reject the *amici*'s interpretation of Article III.⁶

⁵ New York was a party to the 1870 decision of its highest court and therefore the decision is binding on it. In addition, both States have relied on the decision for the past 127 years. Elementary notions of *res judicata*, collateral estoppel and *stare decisis* preclude New York from disinterring its argument of 1870 in 1997. See *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984); *Kremer v. Chemical Constr. Co.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980).

⁶ In large part, the Historic Trust premises its concerns on the purely hypothetical assumption that at some indeterminate time the federal government may relinquish its control over Ellis Island. The Island is part of the Statue of Liberty National Monument operated by the National Park Service. The notion that the federal government will sell or dispose of the

Amici speculate that recognizing New Jersey's sovereignty over the filled lands will create insurmountable difficulties, embroil this Court in ongoing controversy, and potentially impede historic preservation. *Amici* further suggest that the historic preservation laws of New York are superior to New Jersey's laws and that New Jersey has a lesser interest in preservation than New York. Thus, while paying lip-service to the notion that the Compact is to be enforced as written, *amici* urge this Court to base its decision on considerations which are both totally unfounded and completely irrelevant.

Ellis Island is owned and controlled by the United States, which has consulted both New York and New Jersey with respect to preservation matters. There is no evidence that this approach has impeded preservation in any way.⁷ And, more importantly, in prior litigation, the United States took the position that both New Jersey and New York had jurisdiction over Ellis Island. *Collins v. Promark Prods., Inc.*, 956 F.2d 383 (2d Cir. 1992). Thus, the prospect of dual jurisdiction has not been of concern to the governmental entity which is responsible for preserving and administering the Island on a day-to-day basis.

Similarly, there is no evidence that New Jersey and New York will be unable to cope with shared jurisdiction. New York and New Jersey already share jurisdiction over the waters between the States under Articles III, IV and V of the Compact. The record contains no indication whatsoever that this situation has created any of the insurmountable difficulties which *amici* hypothesize may occur.

Island is pure fantasy.

⁷ The Administration Building and the Kitchen and Laundry Building have been renovated after consultation with *both* States. The federal government was not faced with *any* dispute by the States in the preservation of those buildings.

Over the years, New York and New Jersey have been able to harmoniously address issues of joint interest. For example, since 1921 the States have collaborated on transportation and other port-related projects through the Port Authority of New York and New Jersey, a bistate entity. As another example, both States are members of the Delaware River Basin Commission, which was established in 1961. See N.J. Stat. Ann. §§ 32:11D-1, *et seq.* (West 1990). See also, Andrew C. Revkin, *Harbor to Be Dredged, but Much Tainted Mud Lacks Home*, N.Y. Times, May 12, 1997 at p. B1. *Amici's* groundless fears of endless disputes regarding Ellis Island are sheer speculation and hyperbole.

Amici's additional contentions that New York's preservation laws are superior to New Jersey's laws and that New York has better experience in preservation are patently offensive as well as irrelevant. As a threshold matter, New Jersey takes issue with *amici's* view that New York's historic preservation laws are in some sense better than comparable laws in New Jersey. Indeed, the National Trust for Historic Preservation correctly notes that Jersey City has a comprehensive landmarks law. New Jersey state law also bars the State or its local government units from undertaking projects that will "damage or destroy" a structure on the Register of Historic Places. N.J. Stat. Ann. §13:1B-15.131 (West 1991). New Jersey's Waterfront Development Act comprehensively regulates projects on property fronting upon navigable waters of the State. See N.J. Stat. Ann. §12:5-1, *et seq.* (West 1979).⁸ Taken together, New Jersey law and

⁸ The State's regulations implementing that Act, N.J. Admin. Code tit. 7 §7-1, *et seq.* (1996) and N.J. Admin. Code tit. 7 §7E-1, *et seq.* (1996), provide that within the New York Bay, Hudson River area, the territorial area subject to State regulation includes any tidal waterway and all lands lying thereunder, up to the mean high water line, as well as an adjacent uplands area. N.J. Admin. Code tit. 7 §7-2.3(a)(3) (1996). In addition, the State's implementing regulations include historic sites as areas requiring special protection, and discourage development that

local regulation provide strong measures for the protection of landmark structures at Ellis Island.

In any event, this Court has never resolved an interstate boundary dispute or interpreted an interstate Compact by comparing the laws of the disputing States, and deciding which laws it prefers. Similarly, this Court has never resolved such a dispute by examining each States' experience in a particular area, and determining which State possesses better qualifications. Rather, this Court has based its decisions on the terms agreed to by the States. The Court must enforce the Compact as written. *Texas v. New Mexico*, 482 U.S. 124 (1987); *Arizona v. California*, 373 U.S. 546, 565 (1963).

Finally, the New York Landmarks *amici* maintain that the Court should declare that New York has "at the very least" certain police power jurisdiction over all of the waters of the River and the Bay, and such jurisdiction extends to the filled portion of Ellis Island. The Landmarks *amici* argue that this power is synonymous with the "police power" of State and local governments and would include the power to regulate the preservation of landmark structures.

This is merely another attempt to extend New York's sovereignty to the New Jersey shore. What the Landmarks *amici* call "police power" is the full range of sovereign power under some other name. New York's jurisdiction under Article III over the waters of the River and New York Bay does *not* encompass such a range of governmental powers.

detracts from, encroaches upon, damages, or destroys the value of historic resources. See N.J. Admin. Code tit. 7 §7E-3.36 (1996).

The nature and extent of New York's jurisdiction over the waters under Article III were defined as early as 1870 by the New York Court of Appeals:

It was to be a police jurisdiction of and over all vessels, ships, boats or craft of every kind that did or might float upon the surface of said waters, and over all the elements and agents or instruments of commerce, while the same were afloat in or upon the waters of said bay and river for quarantine and health purposes, and to secure the observance of all the rules and regulations for the protection of passengers and property, and all fit governmental control designed to secure the interests of trade and commerce in said port of New York, and preserve thereupon the public peace. [*Central R.R.*, *supra*, 42 N.Y. at 299-300.]

See also, *Central R.R.*, *supra*, 209 U.S. at 479 (holding that New York's police power over the waters "was to promote the interests of commerce and navigation, not to take back the sovereignty that otherwise was the consequence of article 1"); *Central R.R.*, *supra*, 56 A. at 245 (holding that "the jurisdiction that was conceded to New York over the land and waters within the territorial limits of New Jersey was not governmental").

New York's jurisdiction does not extend to all police powers that might be exercised by a State or local government. What is more, preservation of historic structures is not the sort of regulation that pertains to the interests of commerce and navigation. New York's jurisdiction applies in the waterways. Once the submerged lands around the original Island were filled, there was no longer any basis upon which New York could exercise jurisdiction over navigation and commerce. Article III

therefore provides no basis whatsoever for the exercise by New York of jurisdiction over the filled portions of Ellis Island.

POINT IV

THE EVIDENCE OF NEW JERSEY'S REFUSAL TO ACQUIESCE IN NEW YORK'S PURPORTED ASSERTION OF GOVERNMENTAL DOMINION OVER THE FILLED LANDS IN THE PERIOD AFTER 1955, STANDING ALONE, FORECLOSES NEW YORK'S EFFORT TO APPROPRIATE NEW JERSEY'S TERRITORY.

New York argues that regardless of how the Compact is interpreted, the Court should find that New York's jurisdiction extends to the whole of the present Island by application of the doctrine of prescription and acquiescence. New York focuses its argument entirely on the period from 1890 through 1955, and contends that during this time New York exercised sufficient dominion over the filled lands and that New Jersey acquiesced in New York's prescription of the whole of the Island.

In limiting its argument to the period from 1890 to 1955, New York ignores the overwhelming evidence of New Jersey's non-acquiescence in the years after 1955, and raises no exception to the Master's finding that during this period "New Jersey [was] much too active in opposition to New York's jurisdiction for New York to carry her burden on acquiescence," Report at 106. Instead, New York simply insists that by 1955, whatever claim New Jersey may have had to the filled portions of the Island was extinguished. New York's exception should be overruled because the Special Master's determination that New Jersey's non-acquiescence in New York's purported acts of prescription in the period after 1955 was "beyond cavil" is supported by overwhelming evidence in the record. Report at 12.

In July 1955, when the federal government was considering the sale of Ellis Island, the Commissioner of New Jersey's Department of Conservation and Economic Development wrote to the Regional Director of the General Services Administration ("GSA"), stating that Ellis Island was within New Jersey's jurisdiction. P97, P98, P99, P100, P133. In August 1955, the Jersey City Municipal Council adopted a resolution making the same assertion and urging support for a proposal by James F. Murray, a member of the New Jersey Senate, that the Island be converted to a public recreation area and ethnic museum. P347. At that time, the New Jersey Senate unanimously passed a resolution stating that Ellis Island was within New Jersey. 1955 Minutes of the New Jersey Senate 1031 (August 15, 1955). Additionally, New Jersey Representative T. James Tumulty stated during a debate on the floor of the House of Representatives that, "I am not going to prolong the discussion, but Jersey City claims that Ellis Island, in particular, is within the confines of Jersey City." *Congressional Record*, July 30, 1955, at 12387. The Regional Director of the GSA took note of the claims raised by New Jersey officials. P107.

The assertions of New Jersey's jurisdictional claim to Ellis Island continued, and these actions were well publicized. In January 1956, twenty-five state and county officials from New Jersey undertook an inspection of Ellis Island to reaffirm New Jersey's claim. The inspection was reported in the press. See P108 (N.Y. Times, January 5, 1956; Newark Evening News, January 5, 1956). Representative Irwin D. Davidson of New York commented on New Jersey's claim to jurisdiction over the Island in remarks printed in the *Congressional Record* on March 7, 1956. P109.

The New York Times also reported on the federal government's plans to dispose of the Island on March 14, 1956 and stated that New Jersey had "always contested"

New York's claim to jurisdiction. This report also made mention of the January 4, 1956 inspection tour by the New Jersey officials. P110. In addition, *Business Week* reported on Ellis Island in its September 29, 1956 issue, stating that the Island's potential sale presented the question of jurisdiction between the two States. P111.

Additional actions taken by New Jersey officials in this period further underscore that the question of jurisdiction over Ellis Island was a live controversy. On January 2, 1958, New Jersey State Senator Murray sent a telegram to United States Senators H. Alexander Smith and Clifford P. Case, and Representatives Alfred D. Simiensi and Vincent J. Dellay, all from New Jersey. P113. State Senator Murray asserted that Jersey City had jurisdiction over Ellis Island. See P114 (*The New York Times*, January 3, 1958). Senator Case sent his copy to the Administrator of the GSA who replied stating that the question of whether the property would be subject to New Jersey taxes after sale was a question that had to be resolved between the State and the purchaser. P116.

In June 1959, Governor Robert B. Meyner of New Jersey wrote to a resident of New York concerning Ellis Island and Bedloe's (or Liberty) Island. P123. A copy of this letter was sent to and received by Governor Nelson A. Rockefeller of New York. P487, ¶59; T1291-23 to T1292-24 and T1262-12 to -16. In the letter, New Jersey's Governor stated that the question of jurisdiction over the two islands had "never been settled," and there was speculation whether the islands are in New Jersey or New York. Governor Meyner stated further that in view of the proposed sale of Ellis Island by the federal government, it may be necessary "to decide once and for all whether Bedloe's and Ellis Islands are New Jersey or New York territory." P123.

The issue of jurisdiction over Ellis Island also arose during Congressional hearings on the federal government's

decision to dispose of the Island. New Jersey officials forcefully asserted the State's jurisdictional claims to the Island. *See* Comments of Representative Dominick V. Daniels of New Jersey, P143, p. 119 (stating that there was an immediate need "to determine in which State and municipality the island lies"); Meyer Pesin, Jersey City Corporation Counsel P143, p. 123 (noting the "legal complication of jurisdictional sovereignty over Ellis Island"); Alvin E. Gershen, Development Advisor for Jersey City, P143, p. 129 (suggesting that the Governors of New York and New Jersey resolve the terms of the jurisdictional location of Ellis Island).

New York officials testifying before Congress also recognized New Jersey's jurisdictional claims. United States Senator Kenneth B. Keating of New York noted the existence of the dispute over jurisdiction and submitted a memorandum he had received from the Library of Congress on the issue. P143, p. 64. At the hearing on December 6, 1962, Senator Keating further stated that "one of the first problems which will arise will be to determine whether Ellis Island actually lies within the confines of New York or New Jersey. I am sure that our colleagues from New Jersey will contend that it is a part of New Jersey." P143. *See also* Senator Keating, P143, p. 97 ("it may be that a further compact will be necessary here in order to insure that the purchaser does get clear title . . ."). New York City Mayor Robert Wagner also testified concerning the open question of jurisdiction over the Island. In testimony before a congressional subcommittee he stated that, "I think the question of jurisdiction could be ironed out by a meeting of the minds, if there would be an agreement on the purpose to which the island would be put." P143, p. 250.

In 1963, Jersey City officials continued to assert that the municipality would have jurisdiction over Ellis Island in the event of its sale by the federal government. Mayor Thomas J. Gangemi insisted that Jersey City would have a

say in the development of the Island and on September 5, 1963, Jersey City enacted an ordinance that would control such development. P157. Mayor Gangemi also stated that Ellis Island would be taxed by Jersey City once it was sold to a private owner. In fact, Ellis Island had been on the tax rolls of the city since at least 1940.⁹

On February 11, 1963, the Office of General Counsel of the GSA rendered an opinion by Henry Pike entitled, "Ellis Island, Its Legal Status." P144. The opinion, which the Special Master found to be "highly probative", Report at 140, concluded that the United States had title to the original Ellis Island and the acreage created by the filling of the surrounding underwater lands. The opinion also concluded that New York had jurisdiction over the original Island, and New Jersey had jurisdiction over the part of the Island built on the underwater lands. The opinion stated:

the artificial filling in around the original island, about 3 acres in size, did not operate to change the sovereignty over the filled-in area as sometimes occurs in the case of accretion or erosion. The filled-in area remains, for purpose of applying the provisions of the 1833 compact, as if it were 'land under water' lying west of the middle of the bay and river, which under Article Third

⁹ New York's claim that the evidence of Ellis Island's inclusion on New Jersey tax maps was a "well-kept secret" is entirely specious. The tax records of Jersey City and Hudson County are public documents available for review by any interested party. These documents are no more "secret" than any of the public documents relied upon by New York in support of its claimed acts of prescription.

has been consistently held to be part of New Jersey. [P144, p. 3-4].¹⁰

The February 11, 1963 opinion essentially confirmed what United States Attorney General Moody had determined in 1904: the underwater lands around the original Ellis Island were subject to New Jersey's sovereignty and jurisdiction. Significantly, the federal government has adhered to the conclusions reached in the GSA's opinion. In June 1968, the National Park Service prepared a preliminary master plan for the use of Ellis Island. This document concluded that the original three-acre Island was within New York and that the remaining land was "part of the State of New Jersey and under her sovereignty" P166, p. 13.

Shortly thereafter, Congressman (and later New York City Mayor) John V. Lindsay introduced a bill concerning the future use of the Island. As the Special Master noted, in Representative Lindsay's supporting statement "he recognized that the twenty-four acres of fill on Ellis Island 'were never New York property, but as subaqueous territory, pertained to the jurisdiction of New Jersey.'" Report at 138-139, quoting from P154.

A multi-volume analysis of the conditions on the Island issued by the National Park Service in December 1980 reiterated the same point. P170. (The original Island is part of New York, the 24 acres created by landfill and the surrounding waters "are part of the state of New Jersey.") *See also*, Letter of Undersecretary of the Department of Interior Joseph Simmons, III, to Senator Bill Bradley of New

¹⁰ In the opinion, Pike suggested in conclusory fashion that reference in the Compact to "land under water" refers to land below the low water mark. Yet Pike clearly indicated that New York's jurisdiction was confined to the original island which was about three acres. If New York's jurisdiction was so limited, it was limited to lands above the mean high water line, not the low water line.

Jersey concerning employment opportunities for New Jersey workers on the Statue of Liberty restoration project. ("We are aware . . . that the majority of Ellis Island is in the State of New Jersey due to landfill not being covered by the 1833 Treaty.") P171, P172.

In January 1984, the National Park Service completed a form to nominate the Immigration Station on Ellis Island for listing on the National Register of Historic Places. Harlan D. Unrau, New York's expert, signed the form. Under the section of the document entitled, "Location," both New York and New Jersey were listed. In the section that called for "Geographical data," the form stated, "List all States and Counties for Properties Overlapping State or County Boundaries." The Park Service wrote on the form that Ellis Island was geographically within both New York State, New York County, and New Jersey, Hudson County. D74, *Historic Resource Study*, *supra*, pp. 1344, 1350. Notably, the titles to Unrau's two Ellis Island studies both indicate that Ellis Island is part of the Statue of Liberty National Monument which is stated to be in "New York-New Jersey." *Id.*; *Historic Structure Report*, *supra*. Those studies are official publications of the National Park Service.

Unchallenged pronouncements by the federal government concerning the boundaries between States are significant to the determination of whether a boundary has changed through prescription and acquiescence. In *Michigan v. Wisconsin*, 270 U.S. 295 (1926), the Court made clear the importance of a boundary interpretation by the United States and a State's failure to object thereto. In that case, Michigan was found to have lost its claim to disputed land that the federal government determined to belong to Wisconsin. As the Court explained:

the line as claimed by Wisconsin has been, from the time of the Burt survey, accepted as the true boundary by the United States, and,

its surveys, plats, and maps, sales and other acts in respect of the public lands, continuously and consistently recognized, with the knowledge of Michigan and without protest on her part. [*Id.*, 270 U.S. at 307].

Similarly, in deciding a boundary challenge in *Louisiana v. Mississippi*, 202 U.S. 1 (1906), the Court gave considerable weight to determinations by the United States of which State had sovereignty over the disputed land. The Court noted that "[t]he General Land Office of the United States, in all of the maps it has caused to be made of Louisiana and Mississippi, has been consistent in its recognition of the ownership by Louisiana of the disputed" parcel. *Id.*, 202 U.S. at 57.

By 1986, a New Jersey Representative even went so far as to seek a judicial determination of the State's interest in the Island. New Jersey's sovereignty over the filled portions of the Island was the subject of a complaint filed in a New Jersey court by a member of the State's congressional delegation. Although the court determined that it lacked jurisdiction over the dispute, New Jersey, as a defendant, clearly expressed its claim over the filled portions of the Island in the action against New York. See *Guarini v. New York*, 521 A.2d 1362 (N.J. Super. Ct. Chan. Div.), *aff'd*, 521 A.2d 1294 (N.J. Super. Ct. App. Div. 1986), *cert. denied*, 484 U.S. 817 (1987).

In addition, in 1992 New Jersey appeared as *amicus curiae* asserting its sovereignty over the filled portions of Ellis Island in *Collins*, *supra*. In that case, the position asserted by the United States was wholly in accord with the February 11, 1963 GSA opinion. The question squarely presented in that case was whether New Jersey law applied to a controversy which arose from an accident that occurred on the portion of the islands created by artificial filling. The federal government maintained that under the Compact of

1834, the filled land was in New Jersey and subject to its jurisdiction.

On January 8, 1993, New Jersey's Attorney General wrote to the Attorney General of New York to reassert New Jersey's claim of jurisdiction over the filled portions of Ellis Island. Although the letter did not result in a resolution of the boundary dispute, New York was again put on notice of New Jersey's territorial claim.

All of the aforementioned evidence establishes beyond dispute that New Jersey had never acquiesced in any purported acts or prescription by New York. Any conceivable doubt on that score would be laid to rest by the 1986 Memorandum of Understanding executed by the Governors of both States. That agreement explicitly recognized New Jersey's right to share the tax revenue collected by *both* States on the Island and conclusively establishes that New Jersey had not acquiesced in any claim by New York to jurisdiction over the filled land.

Following initiation of *Guarini, supra*, New Jersey Governor Thomas H. Kean and New York Governor Mario M. Cuomo executed a Memorandum of Understanding in which both agreed that the two States would share tax revenue collected by both States on the Island. The Governors promised to use their best efforts to have legislation enacted in their respective States dividing tax revenue attributable to the Island. The agreement was executed on June 23, 1986. New Jersey enacted implementing legislation in 1987, N.J. Stat. Ann. §32:32-1, *et seq.* (West 1990). New York has not enacted a law to carry out the agreement.

Without question, when executing the Memorandum, New York recognized that New Jersey had never acquiesced in New York's purported acts of prescription over the filled portions of the Island. It defies logic for New York to claim

that New Jersey had relinquished its jurisdiction over the Island prior to 1955 in light of New York's admission more than thirty years later that New Jersey was entitled to a portion of the tax revenue collected on the Island. There is no explanation for New York's agreement to divide tax revenue from the Island other than New York's indisputable admission that New Jersey had *not* been divested of its jurisdiction over the filled portions of the Island.

An exercise of taxing power is one of the "primary indicia" of a State's jurisdiction. *Illinois v. Kentucky*, 500 U.S. 380, 385 (1991). This Court has explained that any "well-authenticated instance of an effort on the part of [State] authorities to tax property located" on disputed land is significant to the determination of prescription and acquiescence. *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933). In light of its admission in the Memorandum of Understanding, New York cannot convincingly argue that New Jersey's sovereignty over the filled land was lost through prescription and acquiescence prior to 1955.

POINT V

NEW YORK'S CESSIONS OF JURISDICTION IN 1800 AND 1880 PRECLUDE NEW YORK FROM EXERCISING THE RANGE OF GOVERNMENTAL POWERS NECESSARY TO ESTABLISH PRESCRIPTION.

The federal government's pervasive control over Ellis Island following the 1834 Compact left New York without the requisite power to exercise the dominion and control necessary to establish prescription over the filled lands. Not only did New York cede its jurisdiction over Ellis Island to the federal government on two occasions, the United States also maintained a far-reaching presence on the Island for more than a century, controlling the day-to-day operation of every facet of the facilities located there. In these

circumstances, New York had no opportunity to prescribe sovereignty over New Jersey's territory in any meaningful fashion.

It is well-settled that such transfers of jurisdiction vest the federal government with exclusive authority over the ceded area and results in a complete dilution of State control. A cessation of jurisdiction by a State when transferring title to land to the United States results in the federal government becoming "the only authority operating within the ceded area." *Macomber v. Bose*, 401 F.2d 545, 546 (9th Cir. 1968)(citing *Collings v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938)). "When the United States acquires title to lands, which are purchased by the consent of the legislature of the state within which they are situated ... the Federal jurisdiction is exclusive of all state authority." *United States v. Unzeuta*, 281 U.S. 138, 142 (1930). While a State may reserve the right to serve civil and criminal process upon land transferred to the United States, such a limited exclusion does not affect the exclusive federal jurisdiction that vests over the transferred land. See e.g., *United States v. State Tax Comm'n*, 412 U.S. 363, 371-372 (1973). Thus, all controlling legal precedents indicate that the United States had exclusive jurisdiction over the lands ceded to it by New York, that State's reservation of the right to effect civil and criminal process notwithstanding.

New York's expansive cessions of jurisdiction to the federal government stand in sharp contrast to the circumstances presented in *Arkansas v. Tennessee*, 310 U.S. 563, 571 (1940), in which Tennessee was found to have prescribed jurisdiction over land owned by the federal government. Nothing in the opinion of the Court in that case suggests that Tennessee had ceded its jurisdiction over the disputed land to the United States. Nor is there any indication in this Court's holding that the federal government operated a facility on the land or was responsible for the day-to-day maintenance and control of the property. To the

contrary, the record suggests that individuals resided on the federally owned property, paid land taxes to Tennessee and attended Tennessee schools. *Id.* 310 U.S. at 567. New York, on the other hand, transferred its authority and control over Ellis Island to the federal government, which maintained an extensive presence on the Island.

Certainly, in light of the federal government's exclusive control of the filled portions of Ellis Island, any purported acts of prescription by New York were equivocal at best and not material enough to put New Jersey on notice of New York's attempt to usurp sovereignty or to constitute prescriptive acts sufficient to justify a transfer of sovereignty over the disputed land.

POINT VI

NEW YORK'S EVIDENCE OF PRESCRIPTIVE ACTS IN THE PERIOD OF 1890 TO 1955 FAILS TO ESTABLISH THAT NEW YORK EXERCISED DOMINION AND SOVEREIGNTY OVER THE FILLED LANDS FOR A SUFFICIENTLY LONG PERIOD.

In order to establish its claim of prescription and acquiescence New York must prove, by a preponderance of evidence, both "a long and continuous possession of, and assertion of sovereignty over" the disputed land, and a lengthy acquiescence by New Jersey in New York's purported acts of possession and control. *Illinois, supra*, 500 U.S. at 384. Only a "long acquiescence in the possession of territory under a claim of right and in the exercise of dominion and sovereignty over it, is conclusive of ... rightful authority." *Oklahoma v. Texas*, 272 U.S. 21, 47 (1926). The Special Master correctly determined that New York's evidence failed "to demonstrate the unequivocal acts of prescription demanded by this Court's jurisprudence." Report at 145.

New York's claims of prescription must be examined in light of New York's undisputed jurisdiction over the portion of Ellis Island that existed at the time of the 1834 Compact. Because New Jersey does not challenge New York's jurisdiction on the "original" Island, any evidence of New York's acts of prescription over that land are irrelevant to a claim of sovereignty to the portions created by fill subsequent to 1834. Thus, the Special Master was right to examine carefully New York's evidence of prescription to determine if any proof exists that New York asserted control over the disputed portions of the Island.

In addition, as the Special Master correctly pointed out in his Report, the dominant fact regarding Ellis Island in the relevant prescriptive periods is the federal government's ownership and pervasive control of the whole of Ellis Island. In the face of that dominant reality, any of the sporadic and episodic acts which New York now claims as evidence of prescription cannot be seen as having provided New Jersey with notice of any genuine or credible effort by New York to appropriate New Jersey territory by prescription.¹¹

¹¹ Nor can New York claim that its exercise of jurisdiction over the original Island translates into acts of prescription over Islands No. 2 and 3. New York mistakenly relies on the holding in *Michigan, supra*, for the proposition that it had "color of title" to Islands Nos. 2 and 3, and, therefore, exercised dominion over all three Islands by virtue of its exercise of jurisdiction over the original Island. In *Michigan*, Wisconsin was found to have exercised jurisdiction over a series of islands that had been "surveyed and platted as belonging to Wisconsin" by the United States government. *Id.*, 270 U.S. at 312. Although Wisconsin had actually exercised jurisdiction over all but a few of the islands, several had not been subject to that State's prescriptive acts. However, because Wisconsin was operating pursuant to the federal government's declaration that the entire series of the islands belonged to Wisconsin, the State was deemed to have exercised jurisdiction over those islands which had not been subject to specific acts of prescription. *Id.*, 270 U.S. at 313-314. New York, on the other hand, never had the benefit of a federal declaration that it had jurisdiction over Islands Nos. 2 and 3. To the contrary, the federal

- 1) **New York failed to prove a consistent and long-standing policy recording vital statistics for births, deaths and marriages on the filled portions of Ellis Island.**

New York failed to establish a consistent, long-standing practice of recording births and deaths on the filled portions of Ellis Island. New York produced only twenty-two death certificates for all of the decades that that State claims to have prescribed jurisdiction over the filled portions of the Island. All but one of those records are from a three-month period in a single year: 1924. Yet, in that year, some 105 individuals are reported to have died on Ellis Island. *See* D74 at 638. New York's evidence also identifies that there were 267 deaths in 1908 and their expert's testified that there were probably thousands more from 1890 to 1954. T2718-5 to T2722-9. Yet, New York has produced only a smattering of death certificates from its records. INS Historian Marian Smith, New Jersey's witness, could not find any regulation or policy of the State or City, or the federal government, that would support a finding that Ellis Island deaths were routinely recorded in New York. D1-22; T3941-19 to T3942-20.

New York also produced only twenty-three birth certificates and seventeen of these certificates are for births occurring prior to 1897, when a fire leveled the wooden buildings on Ellis Island. This fire destroyed the original hospital complex as well, the bulk of which was located on the original Island, along with the Hospital Administration Building which was entirely within the confines of the original Island. T3919-11 to T3934-15 (discussing location

declaration that it had jurisdiction over Islands Nos. 2 and 3. To the contrary, the federal government has consistently held the opinion that the portions of Ellis Island created by fill are subject to New Jersey's sovereignty. Therefore, New York lacked "color of title" to Islands Nos. 2 and 3, and cannot claim that its prescriptive acts over a portion of Island No. 1 should be interpreted to be acts relating to the two newer Islands.

of buildings prior to the 1897 fire); *see also* P522-P526. If New York issued seventeen birth certificates for births on the portion of the Island over which it had jurisdiction, this is not evidence of prescription over the filled lands. All New York could provide were six birth certificates for Ellis Island after 1897, three of which do not list the place of birth on the Island. As INS Historian Smith testified, there was no proof that the federal government had any policy of recording all Ellis Island births in New York. T3920-1 to -21; T1423-14 to -20.¹²

Similarly, New York's evidence regarding the recording of marriages was totally deficient. New York produced only six marriage certificates. Two of those certificates indicate that the marriage took place on Manhattan Island, not Ellis Island. The remaining four marriage certificates do not indicate where the marriages took place. D46-49. Furthermore, since, as INS Historian Smith testified, the recorded marriages were of immigrants who had not technically landed for immigration purposes, their certificates merely identify the administrative address of the Ellis Island immigration station as a residence. T1356-18 to T1364-13 citing P464-P469. Although New York claims that "hundreds and hundreds of weddings" took place on the Island, there is absolutely no evidence of whether those marriages occurred on the original Island or filled lands, and no evidence of which State, if any, issued marriage certificates for those ceremonies. T1356-18 to

¹² New York comments that two of the birth certificates refer to the Ellis Island hospital as the place of birth. NY Brief at 24. New York adds that three birth certificates refer to the place of birth as Ellis Island and then suggests that it is reasonable to assume that the births occurred in the hospital on the filled land. New York cannot appropriate New Jersey land with such assumptions. It either proves an act of prescription on New Jersey territory or it does not. There is no basis for any assumption as to where those three births occurred, and the remaining two New York birth certificates are a slender reed upon which to claim prescription.

T1358-14; T2702-5 to -18; T2705-3 to -5; T2701-6 to T2718-2. On the other hand, there is considerable evidence in the record suggesting that marriages of immigrants did *not* take place on the Island. Immigrants were taken to Manhattan to be married. Report at 115.

2) New York did not prescribe the tax laws for the filled lands.

There is no evidence that New York levied or collected any taxes on Ellis Island for the period from 1890 through 1991. The record shows that New York did not levy or collect taxes attributable to activities on the filled lands until six years ago, hardly a sufficient period to constitute prescription and after execution of the 1986 Memorandum of Understanding in which New York's Governor explicitly recognized New Jersey's authority to collect taxes associated with Ellis Island.

Without question, when executing the Memorandum of Understanding, New York recognized New Jersey's authority to collect taxes related to Ellis Island. In light of that admission, New York cannot rely upon tax collection activity in the subsequent years as evidence of prescription, particularly when the Memorandum contemplated a sharing of tax revenue. Thus, any evidence of tax collections after the execution of the Memorandum has no bearing on New York's prescription claim.

3) New York did not enforce its civil or criminal laws on the filled portions of the Island.

Contrary to New York's assertions, there is no credible evidence that New York enforced its civil or criminal law with regard to any actions on Ellis Island. This point was essentially conceded by Harlan D. Unrau, New York's expert. He stated that he had no evidence that New York's laws governed activities on the Island. T3608-7 to

-25. New York was asked in discovery to produce evidence of a civil or criminal complaint of New York or New York City with respect to unlawful activities on Ellis Island. It produced nothing and essentially admitted that in response to a demand for admissions. See NY Response to Admission, No. 82.

4) New York did not provide police or fire protection on the Island.

New York police did not patrol the Island and there is no documentary proof that the New York Harbor Police did anything other than patrol the waters around the Island. The only proof offered by New York relates to very limited assistance rendered by its police to the National Park Service, along with the Jersey City police, to provide some measure of protection of the Island from vandalism or theft in the 1970's when the Island was essentially abandoned. T2595-4 to T2614-2; T3950-23 to T3961-10; T2797-22 to T2802-9, citing D50; T2616-10 to T2619-22; T2770-1 to T2782-1, citing D50. NY Response to Request for Admissions, No. 82-84. There has never been a New York police presence on the Island.

Having reviewed the evidence cited by New York concerning policing of Ellis Island, INS Historian Marian Smith stated flatly, "I have yet to see any evidence of the New York City or State police on the island exercising any of their powers even though we know the immigration law allows for the admittance to make arrests. They may have, but we haven't seen any evidence of it. At least I haven't." See T3950-23 to T3961-10, specifically, T3955-6 to -10; see also T2770-1 to T2782-1 citing D50-51 (re-direct) and compare T2797-22 to T2802-9 citing D50-51 (re-cross).

There is also no evidence of the regular provision of fire protection services by New York. The evidence is clearly to the contrary: the federal government provided its

own fire protection apparatus. Again, New York's expert conceded this point. T3686-1 to -10; T26142 to T2616-9; T3682-19 to T3686-11 (discussing the only two fires when New York firefighters may have been called). Although New York points to assistance rendered by New York in the 1916 fire that resulted from the Black Tom explosion in New Jersey, this was an extraordinary event and the rendering of emergency assistance was unremarkable.

- 5) **New York did not prescribe the health or building codes for the Island, it did not mandate rates of wages to be paid, nor did New York's laws apply to workers' compensation claims.**

There is also no evidence supporting New York's contention that New York State and New York City building or health codes applied to activities on Ellis Island, and there is certainly no evidence that New York State or New York City enforced state or local laws there. Indeed, a specification that was issued by the federal government in 1900 explicitly stated that the New York City codes and regulations did not apply to federal construction activities. D775 at p.10. In addition, a specification issued in the 1930's showed that the contractors were not required to comply with local building regulations for construction work within the lot lines of the government properties. D805, p. 3, ¶20. In fact, New York admitted in response to a formal request from New Jersey that "it has produced no documents to support a conclusion that any governmental authority organized pursuant to the laws of New York ever enforced its building codes or ordinances on Ellis Island at any time after the acquisition of Ellis Island by the federal government" New York Response to Request for Admission No. 74.

To the extent the federal government did follow local building regulations, it did not do so out of any legal compulsion, but rather, merely by choice. T1378-13 to

T1381-14 citing D775 at 10, and D426-428. Thus, the federal government's decision to follow New York State or New York City building codes for a particular project is clearly not an act of sovereignty by New York and cannot be given any weight in the prescription analysis.¹³

- 6) **New York offered no evidence that any resident of Ellis Island voted in a New York election and its registration of Ellis Island voters is insufficient to establish prescription over the filled lands.**

New York's evidence regarding voting also fails to establish its prescription claim. Contrary to New York's assertions, there is no evidence that any Ellis Island resident actually voted in a New York election. New York produced voting registers for only ten out of the more than 100 years during which New York claims to have prescribed jurisdiction over the filled portions of the Island. D52-58 and D953-956. While New York suggests that this evidence is a representative sampling of its voting registration records, the record contains no evidence regarding the ninety or more years not covered by the evidence, and no inference can be drawn that evidence of voter registration exists for those years.

¹³ New York also maintains that the federal government's decision to base prevailing wage rates on wages paid in New York is an act of prescription. But, the federal government used New Jersey wage rates as well. Thus, the evidence on this point is equivocal. In addition, New York relies upon its evidence that New York law governed workers' compensation claims for workers at Ellis Island. It presented evidence of one such claim but that claim was presented at a time when the States had no authority to entertain claims for workers on federal projects. See *Murray v. Joe Gerrick & Co.*, 291 U.S. 315, 318 (1934). Indeed, it was not until 1936 that Congress permitted the application of state workers' compensation laws to workers injured on federal property. See 40 U.S.C. §290.

In addition, after 1954, no one lived on the Island and no one lives on the Island today. Thus, for the last 43 years, not one individual has claimed to be qualified to vote in a New York election by reason of residency on the filled portions of Ellis Island.

An examination of the voting district maps prepared by the New York City Board of Elections further undermines New York's arguments. On each of these maps, the size and shape of Ellis Island does not reflect the fill added after 1834. The oval shape that appears on the maps is the same shape of the original Island. D957-965; New York Response to Request for Admission No. 13. The maps clearly do *not* show an intent to include the filled portions of the Island within a New York voting district.

Another indication that the City Board of Elections did not consider the filled portions of Ellis Island to be part of the defined voting districts is the fact that each voting map also depicts Oyster Island, an island which New York expert Donald F. Squires identifies as having been dredged out of existence as early as 1900. The inclusion within the voting district of a land area that ceased to exist sometime prior to 1900 strongly indicates that the Ellis Island that was depicted on all of the voting district maps was the Island as it existed before the filling of submerged lands. T2724-14 to T2733-7 citing D932 at p.9.¹⁴ This conclusion is confirmed by the fact that the earliest election district statute referred to by New York dates from 1882, prior to any significant fill on the Island. Certainly, the New York Legislature could not have intended to refer to the filled portions of the Island in

¹⁴ In fact, New York statutes for the establishment of Senate and Assembly districts list Ellis Island in tandem with the "dredged away" Oyster Island in 1916, 1917, and 1943. See 1916 N.Y. Laws 373; 1917 N.Y. Laws 798; 1943 N.Y. Laws 359. The reference to Oyster Island was not deleted from New York's statutes until 1953. See 1953 N.Y. Laws 893.

that statute. To the extent that subsequent legislation incorporated the terms of the 1882 law, the filled portions of Ellis Island were not included in any New York election district created by the later statutes.

Notably, registrants who identified themselves as living on the filled areas of the Island may not have been legally qualified to vote under New York law. The New York City Board of Elections derives its authority to establish voting districts under state law. New York's statutes establishing voting districts merely refer to Governor's, Bedloe's and Ellis Islands, or simply to Ellis Island. See NY Brief at 23. The New York State Constitution makes similar reference to the islands with respect to State Senate districts. *Id.* There is no explicit reference suggesting the inclusion in those districts of the filled areas of Ellis Island.¹⁵

- 7) **The federal government did not uniformly "believe" that the whole of Ellis Island was part of New York.**

New York also observes that "[t]here is no question that all three branches of the federal government believed that Ellis Island was in New York." NY Brief at 27. The evidence of record does not support New York's contentions.

¹⁵ New York's census districts conformed to New York's election districts. See e.g. 1892 N.Y. Laws 5, §3; 1905 N.Y. Laws 83, §2. Therefore, the filled lands were not properly within the census district. Federal census districts were drawn based on Congressional districts. The laws establishing those districts did not specifically reference the filled lands. See e.g. 1911 N.Y. Laws 890; 1944 N.Y. Laws 726. There was no reference to Ellis Island in 1951 N.Y. Laws 839 or 1970 N.Y. Laws 5. Furthermore, although the 1960 and 1970 federal census counts inhabitants at Ellis Island, no one was living there in those years.

In support of its argument, New York states that the INS "at all times ... regarded Ellis Island as part of New York." New York's argument relies heavily on letterhead used by the federal agency. *Id.* New York's contention concerning what the INS "believed" is undermined by the plain fact that there was one post office for all of Ellis Island and that the uncontested historical evidence places the post office on the original Island, which explains fully any letterhead designation referring to Ellis Island, New York. T3948-22 to T3950-22 citing P531; T1410-8 to T1411-10. Subsequent actions in 1933 by INS Port Commissioner Edward Corsi in an application to New Jersey for a Waterfront Development Permit, and a later application to New Jersey for a water main construction permit in 1937, underscores the lack of merit in New York's claims. INS Historian Marian Smith testified that the agency acknowledged both the historic sovereignty of New York over the original Island and New Jersey's sovereignty over the filled lands. *See* P488-P490. Within ten years of the INS transfer of the Island, that view was echoed by the Government Services Administration in a formal report entitled "Ellis Island, Its Legal Status." P487 ¶71 citing P144.

- 8) **There was no evidence that the public generally perceived Ellis Island to be part of New York.**

Lastly, the Special Master was also correct in concluding that New York's evidence of public perception was decidedly unpersuasive. New York introduced a series of maps, post cards, letterheads, and other documents with the description "Ellis Island, New York" in an effort to establish that the public perceives Ellis Island to be located in that State. Although public perception can be relevant with respect to a claim of prescription and acquiescence, such evidence is of dubious value with respect to a boundary set by Compact. As this Court explained, public perception of the location of a boundary line "cannot affect the potency

and conclusiveness of [a] compact between . . . states by which [a] line was established" *Virginia v. Tennessee*, 148 U.S. 503, 527 (1893).

Moreover, public perception can be established only through evidence of greater clarity than that introduced by New York. The Special Master correctly concluded that New York failed to establish that the public perception concerns the filled portion of the Island, as opposed to the original lands over which New York has jurisdiction. It would be perfectly consistent with New Jersey's sovereignty over the filled portions of the Island for post cards and letterheads to read Ellis Island, New York, as a portion of the Island has been New York's jurisdiction after execution of the 1834 Compact. The same is true of New York's unsupported allegation that the immigrants arriving on Ellis Island believed that they were in New York. Most, if not all, immigrants arriving at Ellis Island did, in fact, pass through the Main Building, the bulk of which is located on the original Island in New York. Thus, their perception that they were in New York, if such a perception did exist, is not at all contrary to New Jersey's sovereign interest in the filled portions of the Island.

POINT VII

NEW JERSEY DID NOT ACQUIESCE IN NEW YORK'S ISOLATED PURPORTED ACTS OF PRESCRIPTION DURING THE PERIOD FROM 1890 TO 1955.

Although there has been little opportunity for either New Jersey or New York to assert governmental authority over Ellis Island in light of the federal government's presence there, New Jersey asserted its sovereign authority over its territory as soon as the federal government began to fill New Jersey's land.

New York takes exception to the Special Master's finding that the 1904 deed from New Jersey to the United States for the submerged lands around the original Island was a sovereign act. New York endeavors to treat that deed as merely a relinquishment of New Jersey's property interest. The ownership by New Jersey of that land was reflective, as Justice Holmes stated in *Central R.R.*, of New Jersey's ultimate sovereign rights. As the Special Master commented, New Jersey's actions to preserve its property rights were sovereign acts. And the sale of the land was made by New Jersey under laws intended to regulate New Jersey's interest in its tidal lands. 1869 N.J. Laws 383; N.J. Stat. Ann. §12:3-4 (West 1979).

New Jersey asserted its interest in the underwater lands surrounding Ellis Island when faced with unauthorized filling by the federal government. P487 ¶20 citing P405; P490 ¶13 citing P383(a); T1364-15 to T1367-14. That resulted in formal recognition by United States Attorney General Moody of New Jersey's sovereign interests. The federal government consequently purchased the lands designated as now and formerly below mean high water surrounding the original Island in 1904. P487 ¶23 citing P338, P351 at pp.4-5; T1448-1 to T1453-16; T886-6 to -17; T944-1 to T956-9. The deed was recorded in Hudson County, New Jersey, and identified the lands as in the "New York Bay in the County of Hudson and State of New Jersey." P487 ¶26 citing P7; T695-12 to T706-4; T711-5 to T715-2 citing P7. The purchase was reported in a page one story of *The New York Times* on July 19, 1904. P487, ¶25 citing P5.

New York also challenges the significance of the federal New York Harbor Line Board maps -- entitled "Pierhead and Bulkhead Lines for Ellis Island, New Jersey, New York Harbor[,] as recommended by the New York Harbor Line Board" -- as "erroneous," a "misnomer," and a "mapmaker's error" that was "[not] worth the trouble of

changing even if someone had noticed it," due to the "irrelevance of state boundaries to the task of establishing harbor lines" NY Brief at 31-33. New York maintains that the maps were "not published" and that the signature of Secretary of War Elihu Root, a prominent New Yorker and eventually an elected official of that State, was of "uncertain authenticity" and significance. *Id.* These contentions fall wide of the mark.

The United States Secretary of War and members of the New York Harbor Line Board, from 1890 through 1915, as part of their delegated responsibilities, prepared, approved and signed each Harbor Line map. P487 ¶27 citing P330(1) through (9), P387, P398; P386; *see* Appendix F, New Jersey's Brief in Support of Exceptions. These were published maps, adopted by the Harbor Line Board which conducted public meetings, some of which were attended by New York officials.¹⁶ P487 ¶¶21, 22. It is incontrovertible that Secretary of War Elihu Root signed the 1901 map identifying Ellis Island, New Jersey. New York has produced no competent evidence to support its position that Secretary Root's signature evidences his "probable indifference to the error," or that he was derelict in his duties as Secretary of War, which required the review and approval of such lines by statute. Both prior and subsequent maps identifying Ellis Island, New Jersey were approved by

¹⁶ Additionally, records of the New York Harbor Line Board document the receipt of a letter dated June 13, 1900 from the New York City Department of Docks and Ferries, which acknowledges the letter's contents as follows: "receipt of invitation to the Mayor of New York City to attend Harbor Line Board meeting on extension of harbor lines in vicinity of Ellis and Bedloes Islands, and states that as the matter refers to extension of harbor lines in State of New Jersey, the New York Dock Dept. is not concerned in the matter." P487 ¶21 citing P386.

the individuals who held the office of Secretary of War at the time of the maps' publication.¹⁷

New York's arguments are equally unavailing in its criticism of the Special Master's observations concerning the Port Authority amendment to the Compact in 1921. The Special Master concluded that the amendment's silence on the issue of Ellis Island was "a tacit recognition of federal hegemony over the Island" because "both States had the opportunity to discuss any and all issues of State activity in and around New York Harbor." Report at 128-29. He concluded that this silence "also serves as evidence of New Jersey's non-acquiescence." *Id.* at 128. Equally as significant is the conclusion that New York's silence was tacit acceptance of New Jersey's sovereignty over the filled lands as well as the lands west of the boundary in the Bay of New York, when viewed in context of preceding and concurrent events: namely, the public demands by the New Jersey Board of Riparian Commissioners that New Jersey's sovereign interest be recognized by the federal government, the public recognition of New Jersey's sovereign interest by the Attorney General in 1904 and the resulting purchase and recording of the deed in that same year; the decision of this Court in *Central R.R.* respecting the interpretation of the Compact, and the publication of New York Harbor Line Board maps identifying the lands as "Ellis Island, New Jersey" from 1890 to 1915.

¹⁷ New York is also without evidentiary support for its theory that the Harbor Line Board was somehow not up to the task of modifying title blocks of maps. In 1915, the title blocks for the maps were redrafted, and reflected the same designation of "Ellis Island, New Jersey." P384. Moreover, even a cursory examination of the maps shows that the harbor lines around Ellis Island were frequently changed, indicating that alteration of the maps was undertaken by the federal government without any change to the designation of the Island as located in New Jersey.

In addition, Ellis Island was and continues to be identified on the tax rolls of Hudson County, New Jersey, as tax exempt government property. NY Brief at 34. This is not, as New York maintains, "a well-kept secret, unknown not only to the United States and the State of New York but . . . to the State of New Jersey itself." NY Brief at 34. Hudson County's tax records were and continue to be public records, freely available to New York if it had cared to take an interest. New York also insists that an assertion by a local government in New Jersey of its power to tax is not an example of non-acquiescence by New Jersey. But the point is not well taken. New Jersey's local governments only exercise power conferred upon them by the State. *Becker v. Adams*, 181 A.2d 349 (N.J. 1962). If Hudson County believed that Ellis Island was part of New York it would not have included the Island on its tax rolls. In *Central R.R.*, this Court held that New Jersey had the power to tax property on its side of the boundary line, including lands beneath the dividing waters. Hudson County's actions were in accord with that recognized sovereignty.¹⁸

New York also disputes the Special Master's observations and conclusions respecting events in 1933 and 1937 concerning the application for permits for waterfront development and for the construction of a water main at Ellis Island. To support its criticism, New York relies upon unsupported speculation in an attempt to undermine what is obvious about the events; *i.e.*, the federal government complied with the statutory and regulatory requirements of New Jersey. NY Brief at 34-35.

The evidence shows that in 1933-1934, the federal government constructed a new ferry house on the narrow

¹⁸ Both Hudson County and Jersey City participated at various stages in this matter as *amici*. Both entities have submitted letters to the Court supporting New Jersey's exceptions and joining in New Jersey's requests for relief.

strip of land adjoining Island No. 1 and Island No. 2, and filled a rectangular stretch of land behind Island No. 2, the ferry house and a portion of Island No. 1. The United States Bureau of Immigration and Naturalization sought a Waterfront Development Permit issued by the New Jersey Board of Commerce and Navigation. The application for the New Jersey permit was signed by Port Commissioner Corsi. P487, ¶28 citing P10, P11 and N.J. Stat. Ann. §§12:15-1, *et seq.* (West 1979); T1368-5 to T1368-11. New York makes the argument that the federal government was "simply seeking a permit from New Jersey for work on New Jersey's subaqueous lands." NY Brief at 35. But that work was on the very territory New York now claims is within its jurisdiction.

Moreover, in 1937, federal officials applied for and received a permit from the New Jersey Board of Commerce and Navigation allowing construction and installation of a water main from Jersey City, New Jersey, to Ellis Island. In its difficulty in securing an easement from the Jersey Central Railroad, whose property the water main would have to cross, the Justice Department drafted a complaint for filing in the Federal District Court of New Jersey. T1368-12 to T1370-17 citing D470-492 (Bates 1666-1699); T1413-17 to T1418-22 citing D485 (Bates 1688). Thus, the federal government recognized the need to comply with New Jersey law and it further recognized that New Jersey's federal court would have jurisdiction if there was a need to commence a lawsuit.

New York also claims that actions by Representative Mary T. Norton of New Jersey to secure employment from New Jerseyans on Ellis Island construction projects should not be considered evidence of New Jersey's non-acquiescence. Here again, New York's arguments must be rejected. This was surely not an example of a member of Congress seeking work for New Jerseyans on a project in New York City. Representative Norton was of the view that

Ellis Island was part of New Jersey and that her constituents should be employed there.

The federal government acknowledged New Jersey's sovereign right to seek an apportionment of New Jersey residents as laborers for Ellis Island projects. Organized labor unions for New Jersey's workers joined Representative Norton in arguing that Ellis Island was within New Jersey, and United States Senator Kean of New Jersey sought resolution of this issue through the appointment of New Jersey laborers. P487, ¶¶30-44 citing P12-P59. As the Special Master concluded, these were unequivocal assertions of sovereignty and are strong evidence of non-acquiescence on the part of New Jersey because "New Jersey was basing her claims to jobs for her citizens on her sovereignty over the filled portion of Ellis Island" Report at 132.¹⁹

New York's argument that a duly elected United States Representative does not speak for the State which she represents is difficult to take seriously. Apparently, New York attempts to belittle Representative Norton because she was allied with the Mayor of the city that she represented in Congress. However, Mary Norton was a prominent official by virtue of her position as a United States Representative. The fact that she was associated with a politically powerful Mayor had absolutely no bearing on her authority as a member of Congress asserting the rights of her constituents.

The Court has made clear that in determining whether acquiescence existed it is "concerned not only with what [a State's] officers have done, but with what they have said, as well." *Illinois, supra*, 500 U.S. at 386. Any "official act" or "expression" of "any official" is significant to a State's

¹⁹ While New York workers were ultimately employed on the Island because the general contractor did not have a permit to operate in New Jersey, this does not negate the fact that New Jerseyans asserted the State's claim to job opportunities on the Island.

claim of sovereignty. *Massachusetts v. New York*, 271 U.S. 65, 95 (1926). Statements by public officials are of "no little interest" when evaluating a State's active preservation of its sovereignty. *Ohio v. Kentucky*, 444 U.S. 335, 340 (1980). Representative Norton's assertions of New Jersey's sovereign rights must be accorded significant weight.²⁰

POINT VIII

LACHES IS NOT APPLICABLE TO BOUNDARY DISPUTES BETWEEN STATES. ANY INEQUITIES RESULTING FROM A DELAY IN PRESERVING SOVEREIGNTY ARE ADDRESSED THROUGH PRESCRIPTION AND ACQUIESCENCE.

This Court's decisions clearly indicate that laches is not applicable to boundary disputes between States. "[T]he

²⁰ The Special Master correctly rejected New York's claim that it was not "on notice" of New Jersey's assertions of sovereignty over the filled portions of Ellis Island. The Special Master noted that "New Jersey, as sovereign, legally does not need to exercise prescriptive acts over her own territory. Rather, she has to counter New York's prescriptive acts of which she has notice by not acquiescing in those acts." Report at 118. Prescription and acquiescence is akin to adverse possession and incorporates the concept that the party against whom the doctrine is sought to be applied must be on notice of the encroaching State's acts of prescription. *Georgia, supra*, 497 U.S. at 393. Thus, it is New York that must prove that New Jersey was on notice of New York's purported acts of sovereignty over the filled portions of the Island and not the other way around. New York failed to meet this burden.

New York's burden of establishing notice is made more difficult by the fact that New York retains jurisdiction over the original Island. Any of the acts that New York claims constitute prescription could reasonably be interpreted by New Jersey to relate to New York's undisputed jurisdiction over the Island as it existed in 1834. Thus, it would not be unusual for New Jersey to interpret isolated exercises of governmental authority by New York as benign.

laches defense is generally inapplicable against a State." *Illinois, supra*, 500 U.S. at 388. "Although the law governing interstate boundary disputes takes account of the broad policy disfavoring the untimely assertion of rights that underlies the defense of laches and statutes of limitations, it does so through the doctrine of prescription and acquiescence" *Id.* Any equitable considerations that arise from inaction on the part of a State in a boundary dispute are addressed through the application of prescription and acquiescence.

The Special Master incorrectly concluded that the Court's holding in *Kansas v. Colorado*, 514 U.S. 673 (1995), left open the possibility that laches could apply to boundary disputes, where the boundary is established by compact. While the holding in *Kansas* suggests that laches might apply to disputes between States concerning interstate agreements, that opinion contains no suggestion that the Court has abandoned application of the doctrine of prescription and acquiescence in favor of the doctrine of laches when deciding boundary disputes merely because a boundary is established through compact.

The issue in *Kansas, supra*, was whether Colorado had violated an interstate agreement concerning water rights to the Arkansas River. The boundary between those two States was not in question. When examining the question of delay on the part of Kansas the Court opined that it had "yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact." *Id.*, 514 U.S. at 687 (emphasis added). That this observation was limited to the possibility of applying laches to non-boundary disputes is made plain by this Court's subsequent citation to its holding in *Illinois* that laches is generally inapplicable "in the context of an interstate boundary dispute." *Id.*; see also *Block v. North Dakota*, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting) ("[t]he common

law has long accepted the principle [that] neither laches nor statutes of limitations will bar the sovereign.")

While interpretation of certain provisions of the 1834 Compact are at issue in this case, the core dispute between the parties is over their common boundary on Ellis Island. The holding in *Kansas*, therefore, is inapplicable to the extent that the Court infers that laches may be applicable in certain original jurisdiction cases concerning the enforcement of interstate agreements.

As explained above, New York failed to introduce convincing evidence that New Jersey acquiesced in any purported acts of sovereignty by New York over the filled portions of the Island. To permit New York to assert the equitable doctrine of laches after that State has utterly failed to establish the elements of prescription and acquiescence would completely subvert that doctrine. New York seeks to expand its jurisdiction without having to establish that it ever undertook prescriptive acts over the disputed land. It would be entirely inequitable to divest New Jersey of its sovereignty over the filled portions of the Island without any showing at all by New York that that State had exercised governmental control over the disputed land. To do so would render meaningless the long-standing precedents of this Court applying prescription and acquiescence to boundary disputes.²¹

²¹ The Special Master rightly concluded that a State is not required to preserve its claim of sovereignty over disputed land through the initiation of legal proceedings in this Court against the encroaching sovereign. In fact, in a long line of decisions dating back to the very founding of this nation numerous factors apart from the pursuit of judicial relief have been considered by this Court to be indicative of a State's non-acquiescence in another State's exercise of dominion over disputed territory. As this Court plainly stated in *Michigan, supra*, an expression of sovereignty by a State can be made in any "practical way," including, but not limited to, a request for judicial relief. 270 U.S. at 316.

Even if this Court were to apply laches to this matter, there is no evidence in the record of prejudice to New York to justify application of the doctrine to its benefit. "The defense of laches 'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Kansas, supra*, 514 U.S. at 687 (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)).

New York's claim of prejudice is grounded on nothing more than baseless speculation that evidence supporting that State's position was destroyed prior to the time that this action was commenced by New Jersey. Unable to produce any proof that reliable evidence favoring New York's position was made unavailable because of delay, that State instead relies solely on conjecture that vandals pilfered or destroyed documents left on the Island after the federal immigration station was closed in 1955.

The Special Master correctly determined that the record contains no evidence supporting New York's claims of prejudice. While New York's expert, Harlan D. Unrau, introduced evidence that vandals had stolen "plumbing" and "whole sets of dishes" from Ellis Island, Report at 105, n.42, he offered no testimony that documents relevant to this action were also stolen. In fact, Unrau admitted that he had no knowledge of any historic documents relating to Ellis Island that had been lost in the years after the immigration station closed. T2165-1 through T2166-8. Apart from the somewhat incredulous claim that thieves would have been interested in pilfering decades-old bureaucratic documents relating to the operation of an immigration station, New York's claim of "prejudice" is made even less credible by that State's

Furthermore, this Court has held that any "official act" or "expression" of "any official" is significant to a State's claim of sovereignty over disputed territory. *Massachusetts, supra*, 271 U.S. at 95. Surely, this allows for an expression of non-acquiescence to be made in a manner other than through the initiation of legal proceedings.

speculation that the documents presumably stolen from the Island would have proven helpful to New York at the trial of this matter.

Of the vast amounts of documents and other evidence available to the States through the National Park Service, the Immigration and Naturalization Service, the National Archives, and other locations, New York has been able to muster only a paltry smattering of evidence of its purported prescription over the disputed lands. This is hardly surprising since New York had ceded jurisdiction over the land and the federal government exercised exclusive authority there. It strains credibility for New York to claim that of the staggering array of documents generated by the federal government with respect to the operation of Ellis Island, vandals stole essential evidence necessary to establish New York's acts of sovereignty over the filled portions of the Island, as well as New Jersey's acquiescence therein.

Furthermore, the record contains no evidence of the record retention policies in place at government agencies that may have records relevant to this matter. The record contains no evidentiary support for New York's claim that evidence that otherwise would have been available to that State was not retained by relevant agencies. For example, the record contains no testimony establishing that New York's tax authorities destroyed records relevant to this matter, as suggested by New York. Nor is there any proof in the record that New York was rebuffed in any attempt to secure documents. In addition, during the pretrial proceedings in this matter, New York never suggested that it needed further time to investigate its claims.²²

²² The brief of the proposed historian *amici* suggests that any lack of evidence in support of New York's claims may be the result of an inadequate investigation by that State. The proposed *amici* cite dozens of articles, letters, and other materials they allege are material to this matter

Moreover, New York's claim that the recollections of relevant witnesses were lost as a result of delay is not supported by the record or common sense. No evidence was offered by New York to support its claim that the recollections of the individuals who worked and lived on Ellis Island have been lost to time. Ellis Island holds a singularly important position in the history of the United States and in the history of immigration in this nation. It is one of the most widely celebrated places in our nation and the subject of countless books, letters, diaries, and memoirs. Indeed, visitors to the immigration museum now operating on the Island need only take a few steps before encountering the oral histories of dozens of individuals who passed through Ellis Island. For New York to claim that the thoughts and perceptions of those who spent time on the Island have been lost is simply unfounded. The record of this case makes plain that thousands of pages of correspondence, contracts and official documents concerning Ellis Island were made available to the Special Master.²³

but that were not introduced into the record by New York. According to the proposed *amici*, this evidence is available "in publicly accessible state or university collections" and at other collections around the country. (Proposed Historian *Amici* Brief at 7, n.5 and 29, n.16). New York had every opportunity to locate this evidence prior to the hearings in this matter and to present testimony regarding these documents in support of its claims. New York either failed to locate these materials or made the strategic decision not to seek their introduction into the record. Thus, an alleged delay by New Jersey cannot be blamed for New York's failure to undertake a zealous investigation.

²³ There is no reason for this Court to remand this matter for further evidentiary hearings as suggested by the proposed historian *amici*. New York has never made such a request from this Court, nor does the record support such an extraordinary step. Thousands of pages of documents were produced by both parties during discovery, resulting in hundreds of exhibits, numerous expert reports and detailed trial affidavits. Had the proposed *amici* wished to participate in this matter, they had every opportunity to present their views during the trial phase, when the Special

CONCLUSION

For the reasons stated herein, New Jersey respectfully requests that the Court overrule the exceptions of New York and sustain the exceptions of the New Jersey.

Respectfully submitted,

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Master was collecting evidence. The record below suggests that this matter was exhaustively researched and that the relevant documents were presented to the Special Master by the parties and their experts.

